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UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Working Group on the New International
Economic Order
Twelfth session
Vienna, 8-19 October 1990

PROVISIONAL AGENDA

1. Election of officers
2. Adoption of the agenda
3. Procurement
4. Other business
5. Adoption of the report

Notes on the provisional agenda

At its nineteenth session in 1986, the Commission decided to undertake work in the area of procurement as a matter of priority and entrusted that work to the Working Group on the New International Economic Order (A/41/17, para. 243). The Working Group commenced its work on this topic at its tenth session, held from 17 to 25 October 1988, by considering a study of procurement prepared by the Secretariat (A/CN.9/WG.V/WP.22). The Working Group requested the Secretariat to prepare a first draft of a model law on procurement and an accompanying commentary taking into account the discussion and decisions at the session (A/CN.9/315, para. 125).

A draft of the model law on procurement and an accompanying commentary prepared by the Secretariat (A/CN.9/WG.V/WP.24 and A/CN.9/WG.V/WP.25) were considered by the Working Group at its eleventh session (5 to 16 February 1990). The Working Group requested the Secretariat to revise the text of the model law taking into account the discussion and decisions at the session. It was agreed that the revision need not attempt to perfect the structure or drafting of the text. It was also agreed that the commentary

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would not be revised until after the text of the model law had been settled, and that no revision of the commentary would be prepared for the twelfth session of the Working Group. In addition, the Working Group requested the Secretariat to prepare for the twelfth session draft provisions on the review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/331, para. 222).

At its twenty-third session (25 June to 6 July 1990), the Commission expressed appreciation for the work performed by the Working Group so far and requested it to proceed with its work expeditiously (A/45/17, para. 29).

The Working Group is composed of all States members of the Commission. These are:

Argentina, Bulgaria, Cameroon, Canada, Chile, China, Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, France, Germany, Federal Republic of, Hungary, India, Iran, Iraq, Italy, Japan, Kenya, Lesotho, Libyan Arab Jamahiriya, Mexico, Morocco, Netherlands, Nigeria, Sierra Leone, Singapore, Spain, Togo, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Yugoslavia.

Item 1. Election of officers

The Working Group, in accordance with its practice at previous sessions, may wish to elect a Chairman and a Rapporteur.

Item 3. Procurement

The twelfth session will have before it reports of the Secretary-General containing draft articles of the model law on procurement dealing with review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/WG.V/WP.27), and the second draft of the model law on procurement (A/CN.9/WG.V/WP.28).

Item 5. Adoption of the report

The Working Group may wish to adopt, at the close of its session, a report for submission to the twenty-fourth session of the Commission.

Meetings

The session of the Working Group will take place at the Vienna International Centre. Meetings are scheduled from 8 to 12 October, and on 15, 16, 17 and 19 October. No meeting will be scheduled for Thursday, 18 October, in order to allow for the preparation of the draft report of the session. Meeting hours will be from 9.30 to 12.30 and from 2.00 to 5.00, except on Monday, 8 October, when the session will commence at 10.30.

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Working Group on the New International
Economic Order
Twelfth session
Vienna, 8-19 October 1990

PROCUREMENT

Review of acts and decisions of, and procedures followed by, the procuring entity under the Model Law on Procurement

Report of the Secretary-General

TABLE OF CONTENTS

	Page
REVIEW OF ACTS AND DECISIONS OF, AND PROCEDURES FOLLOWED BY, THE PROCURING ENTITY UNDER THE MODEL LAW ON PROCUREMENT	3
ANNEX I. DRAFT PROVISIONS ON REVIEW FOR MODEL LAW ON PROCUREMENT.	6
CHAPTER IV. REVIEW	6
Article 36. Right to review	6
Article 37. Review by procuring entity or by approving authority	7
Article 38. Administrative review	10
Article 39. Certain rules applicable to review proceedings under article 37 [and article 38]	13

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V.90-86445

READEX

Page

Article 40. Judicial review 15

Article 41. Suspension of procurement proceedings [and of performance of procurement contract]. 16

Article 42. Disciplinary, administrative or criminal responsibility of procuring entity 18

ANNEX II. DRAFT RECOMMENDATION OF THE COMMISSION TO ACCOMPANY ITS ADOPTION OF THE MODEL LAW ON PROCUREMENT 19

REVIEW OF ACTS AND DECISIONS OF, AND PROCEDURES FOLLOWED BY, THE PROCURING ENTITY UNDER THE MODEL LAW ON PROCUREMENT

1. The present document has been prepared pursuant to the request of the Working Group at its eleventh session (5-16 February 1990) that the Secretariat prepare for the twelfth session of the Working Group draft provisions dealing with review of acts and decisions of, and procedures followed by, the procuring entity (A/CN.9/331, para. 222). (Those acts, decisions and procedures are hereinafter collectively referred to as "acts".)

2. There exist in most States mechanisms and procedures for review of acts of administrative organs and other public entities. In some States, review mechanisms and procedures have been established specifically for disputes arising in the context of procurement by those organs and entities. In other States, those disputes are dealt with by means of the general mechanisms and procedures for review of administrative acts.

3. Certain important aspects of proceedings for review, such as the forum where review may be sought and the remedies that may be granted, are related to fundamental conceptual and structural aspects of the legal system and system of State administration in every country. Many legal systems provide for review of acts of administrative organs and other public entities before an administrative body that exercises hierarchical authority or control over the organ or entity (hereinafter referred to as "hierarchical administrative review"). Hierarchical administrative review is not, however, a feature of other legal systems. In legal systems that provide for hierarchical administrative review, the question of which body or bodies are to exercise that function in respect of acts of particular organs or entities depends largely on the structure of the State administration. In the context of procurement, for example, some States provide for review by a body that exercises overall supervision and control over procurement in the State (e.g., a central tender board); in other States the review function is performed by the body that exercises financial control and oversight over operations of the Government and of the public administration. Some States provide for review by the Head of State in certain cases.

4. In some States, the review function in respect of particular types of cases involving administrative organs or other public entities is performed by specialized independent administrative bodies whose competence is sometimes referred to as "quasi-judicial". Those bodies are not, however, considered to be courts within the judicial system.

5. Many legal systems provide for judicial review of acts of administrative organs and public entities. In several of those legal systems judicial review is provided in addition to administrative review, while in other systems only judicial review is provided. Some legal systems provide only administrative review, and not judicial review. In some legal systems where both administrative and judicial review is provided, judicial review may be sought only after opportunities for administrative review have been exhausted; in other systems the two means of review are available as options.

6. In some legal systems that provide for judicial review there are considerable differences as to the nature of the courts that are competent to review acts of administrative organs and public entities. In some countries, a separate system of administrative courts exists to review those acts. In other countries, competence to review those acts is vested in courts within a

unified court system. In some of the latter countries the courts are courts of general jurisdiction, while in others the courts constitute a separate division of a unified court system. In yet other countries, competence to review acts of administrative organs and public entities is divided between administrative courts and civil courts.

7. The types of remedies that may be granted for unlawful acts of an administrative organ or public entity vary among legal systems. Remedies that may be granted by hierarchical administrative bodies in many legal systems include annulling or revising the act that is the subject of the complaint. In other legal systems the administrative body cannot annul or revise the act, but it can grant other types of remedies.

8. The nature of judicial remedies that may be granted by courts is in many legal systems linked to the nature of the legal action commenced in the court or to the competence of the court. In some systems, for example, in one category of legal action the court may only annul the act complained of and may not, for example, revise the act or award damages; in another category of legal action, however, damages and other types of remedies may be awarded. In other legal systems, a court may be competent to annul or revise acts found to be unlawful, but not be competent to order an administrative organ or public entity to act lawfully or to enjoin it from acting unlawfully. In addition, the grounds on which courts may grant particular types of remedies differ among legal systems, and depend upon the substantive law in each system.

9. The fact that proceedings for review of procurement actions, decisions and procedures involve fundamental conceptual and structural aspects of legal systems and systems of State administration, and the wide diversity among countries with respect to those aspects, make it difficult to formulate provisions on mechanisms and procedures for review designed for universal application. Any such provisions would have to avoid impinging upon those fundamental aspects, since it is unrealistic to expect countries to adopt provisions that conflict with those fundamental aspects or to adapt their legal or administrative systems to accommodate the Model Law. Accordingly, the provisions have to be more skeletal and contain more variants than in the case of uniform legislation in areas that do not present the difficulties mentioned above and in respect of which a greater degree of harmonization or unification is possible.

10. In light of the foregoing considerations, the Secretariat suggests for consideration by the Working Group three possible approaches to the treatment of the question of review proceedings. The first possible approach is to prepare provisions intended to be adopted by an implementing State as an integral part of the Model Law on Procurement. Although the provisions would have to be skeletal, such an approach would not necessarily be unusual or undesirable. Several existing national procurement laws examined by the Secretariat treat the question of review in a very basic manner and leave the details of the substantive and procedural aspects of the review proceedings to be governed by other laws, regulations or practices in the country. Some national procurement laws do no more than vest a particular administrative organ with competence over disputes concerning irregularities in procurement proceedings. Pursuant to the first approach, the Secretariat has prepared and set forth in annex I to the present document draft provisions on review that might be included in the Model Law on Procurement, together with a commentary on those provisions.

11. The second possible approach is to prepare provisions dealing with review, but to intend those provisions to have a function different from that of the main body of the Model Law on Procurement. The main body of the Model Law would provide a comprehensive uniform legal framework for procurement proceedings (subject to supplementation by procurement regulations in the implementing State). An implementing State would be expected to enact it without change or with only such minimal changes as were necessary to meet particular important needs in the implementing State. The provisions on review, by contrast, would be intended to serve as guidance to implementing States in evaluating the sufficiency and effectiveness of their mechanisms and procedures for review of procurement actions, decisions and procedures. The provisions would contain all of the elements considered by the Commission to be essential components of a sufficient and effective means of review. Further, the provisions could provide some legislative guidance to States that found that their review mechanisms and procedures lacked certain essential elements. Provisions along the lines set forth in annex I to the present document, with or without an accompanying commentary, might be regarded as serving such a function. In adopting the Model Law on Procurement, the Commission could clearly express its differing intentions with respect to the main body of the Model Law and the provisions on review, and strongly encourage implementing States to ensure the sufficiency and effectiveness of their review mechanisms and procedures using the review provisions in the Model Law as a guide.

12. Under the third possible approach, the Model Law on Procurement would not contain provisions of a legislative nature on review. Rather, the adoption of the Model Law by the Commission would be accompanied by an expression by the Commission of the necessity for an effective means of review, and set forth, in the form of a recommendation to States, the elements that it considered essential. A possible formulation for such a recommendation has been set forth in annex II to the present document.

13. The formulation set forth in annex II is modelled after a Directive adopted by the Council of the European Communities (EC) dealing with review in cases covered by EC Directives on the award of public supply contracts and public works contracts (Council Directive of 21 December 1989 on the Co-ordination of the Laws, Regulations and Administrative Provisions relating to the Application of Review Procedures to the Award of Public Supply and Public Works Contracts (89/665/EEC), hereinafter referred to as the "EC review Directive"). Member States of the EC must implement the Directive in their respective legal systems by 1 December 1991 (article 5 of the EC review Directive).

14. If either the second approach (paragraph 11, above) or the third approach (paragraph 12, above) is adopted, the Commission may wish to consider, at an appropriate time, whether it should prepare comprehensive review provisions tailored to different legal systems. That might involve, for example, the preparation of several sets of provisions, each set adapted to the particular circumstances of one of the principal types of legal systems in the world. Or, it might involve providing technical assistance, upon request, directly to a State to aid it to prepare review provisions tailored to the individualized circumstances of that State. The Commission might also wish to consider possible means of providing technical assistance to requesting States in elaborating procurement regulations to supplement the Model Law on Procurement. The Secretariat raises the foregoing possibilities without necessarily expecting the Working Group to act on them at the present time.

ANNEX I

DRAFT PROVISIONS ON REVIEW FOR
MODEL LAW ON PROCUREMENT

* * *

CHAPTER IV. REVIEW

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 214-218; A/CN.9/315, para. 114. The commentary contains notes within square brackets, designated as "Working Group notes", that are intended for the information and guidance of the Working Group in considering the draft provisions. They would not appear in the final version of the commentary to the Model Law.]

An effective means to review acts and decisions of the procuring entity and procedures followed by the procuring entity is essential to guard against misapplication of the Model Law on Procurement or of the procurement regulations, to ensure the proper functioning of the procurement system and to promote confidence in that system. This chapter sets forth provisions establishing a right of review and setting forth provisions governing its exercise. In order to enable the provisions to be accomodated within the widely differing conceptual and structural frameworks of legal systems throughout the world, only basic features of the right of review and its exercise are dealt with. Procurement regulations to be formulated by an implementing State might include more detailed rules concerning matters that are not dealt with by the Model Law on Procurement or by other legal rules in the State. In some cases, alternative approaches to the treatment of particular issues have been formulated and placed within square brackets; an implementing State should choose the formulation that it regards as the most appropriate.

* * *

Article 36. Right to review

Any natural or juridical person, regardless of nationality, who has an interest in obtaining a procurement contract resulting or anticipated to result from procurement proceedings covered by this Law and who claims to suffer, to risk suffering or to have suffered detriment due to an unlawful act or decision of, or procedure followed by, the procuring entity in relation to those procurement proceedings may seek review of the act, decision or procedure in accordance with articles 37 through [42] at any stage of the procurement proceedings or after the procurement proceedings have terminated.

* * *

Commentary

1. Under this article, review may be sought by a person "who has an interest in obtaining a procurement contract ... and who claims to suffer, to risk suffering or to have suffered detriment". The right to seek review thus appertains not only to contractors and suppliers participating in procurement proceedings, but also to persons who have not participated, such as contractors and suppliers who have been unlawfully precluded from participating in procurement proceedings. The article does not deal with the nature or degree of interest or detriment that is required for the person to be able to seek review, or with other issues relating to the capacity of the person to seek review. Those issues are left to be resolved in accordance with the relevant legal rules in each implementing State.

[Working Group note: one such issue to be left to other rules in each implementing State may be whether the right to review is restricted to cases where particular types of provisions are alleged to have been violated. For example, in some legal systems, a distinction might be drawn between, on the one hand, requirements imposed on the procuring entity that are directed to its relationship with contractors and suppliers and that are intended to constitute legal obligations towards contractors and suppliers, and, on the other hand, other requirements that are regarded as being only "internal" to the administration, and that are not intended to constitute legal obligations of the procuring entity towards contractors and suppliers. In those legal systems the right to review would be restricted to cases where the first type of requirement is violated by the procuring entity.]

2. An act, decision or procedure would be "unlawful" if it did not conform to the Model Law on Procurement as implemented by the State, to the procurement regulations or to another applicable legal rule.

3. Review may be sought at any stage of the procurement proceedings or after the procurement proceedings have terminated, even if the procurement contract has entered into force, subject to article 37(2) [and (3)], subject to any time limits for the submission of complaints set forth in the procurement regulations or elsewhere in the law applicable to the review proceedings and subject to any rules in the implementing State relating to prescription or to limitation of actions. [Working Group note: the reference to paragraph (3) of article 37 has been placed within square brackets pending a decision of the Working Group as to whether or not that paragraph should be retained.]

4. The reference to article 42 has been placed within square brackets because the article number will depend on whether or not the implementing State provides for hierarchical administrative review (see paragraph 1 of commentary to article 38).

* * *

Article 37. Review by procuring entity or by approving authority

(1) [Unless the procurement contract has already entered into force,] a complaint shall, in the first instance, be submitted in writing to the head of the procuring entity. However, if the complaint is based on an act or decision of, or procedure followed by, the procuring entity, and that act, decision or procedure was approved by an

authority pursuant to [this Law], the complaint shall instead be submitted to the head of the authority that approved the act, decision or procedure. A reference in [this Law] to the head of the procuring entity or the head of the approving authority includes any person designated by him.

(2) The head of the procuring entity or of the approving authority shall not entertain a complaint unless it was submitted within [10] days after the earlier of the time when the person submitting it became aware of the circumstances giving rise to the complaint or the time when he should have become aware of those circumstances.

[(3) The head of the procuring entity or of the approving authority shall not entertain a complaint, or continue to entertain a complaint, after the procurement contract has entered into force.]

(4) Unless the complaint is resolved by mutual agreement of the person that submitted it and the procuring entity, the head of the procuring entity or of the approving authority shall, within [20] days after the submission of the complaint, issue a written decision. The decision shall:

(a) state the reasons for the decision; and

(b) if the complaint is upheld in whole or in part, indicate the corrective measures that are to be taken. Those measures may include the payment of compensation [for any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings] [for loss suffered by the person submitting the complaint] as a result of an unlawful act or decision of, or procedure followed by, the procuring entity.

(5) If the head of the procuring entity or of the approving authority does not issue a decision by the time specified in paragraph (4), the person submitting the complaint or the procuring entity shall be entitled immediately thereafter to institute proceedings under article [38 or 40]. Upon the institution of such proceedings the competence of the head of the procuring entity or of the approving authority to entertain the complaint shall cease.

(6) The decision of the head of the procuring entity or of the approving authority shall be final unless proceedings are instituted under article [38 or 40].

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, para. 219; A/CN.9/315, paras. 115 and 116. With respect to the forum before which review can be sought, the Working Group agreed at its tenth session that the Model Law on Procurement should provide generally formulated alternatives from which a State could choose those that it wished to implement (A/CN.9/315, para. 116).

The opening words of paragraph (1) ("unless the procurement contract has already entered into force") and paragraph (3) have been placed within square brackets in order to invite the Working Group to consider whether those provisions should be retained. The underlying policy of those provisions is that, once the procurement contract has entered into force, there are no corrective measures that the head of the procuring entity or of the approving authority could usefully require (apart from compensation - see paragraph 3 of the commentary to the present article), unless he were to be authorized to annul the procurement contract. That may be thought to be an extraordinary power to confer on such an officer. The power to annul the contract, if it is to exist at all, may be thought to be more appropriately vested in a court, or at least in a hierarchical administrative body. The purpose of providing for first-instance review to the head of the procuring entity or of the approving authority is essentially to enable that officer to correct defective acts, decisions or procedures. Once the procurement contract has entered into force, it is too late for him to do so. If the provisions within square brackets were to be retained, hierarchical administrative review or judicial review would be available for complaints arising after the entry into force of the procurement contract.]

1. The present article provides for review to be sought in the first instance from the head of the procuring entity or of an approving authority, and subsequent articles provide for hierarchical administrative review and for judicial review. Pursuant to paragraph (1), seeking review under this article in the first instance is a prerequisite to hierarchical administrative review or judicial review.

[Working Group note: the period of time specified in paragraph (2) has been placed within square brackets in order to invite the Working Group to consider what period of time would be appropriate.]

2. Paragraph (4)(b) leaves it to the head of the procuring entity or of the approving authority to determine what corrective measures would be appropriate in each case (subject to any rules on that matter contained in the procurement regulations; see paragraph 5 of the commentary to the present article). Possible corrective measures may include the following: requiring the procuring entity to revise the procurement proceedings so as to be in conformity with the Model Law on Procurement, the procurement regulations or other applicable rule of law; if a decision has been made to accept a particular tender and it is shown that another tender should be accepted, requiring the procuring entity to accept that other tender; or terminating the procurement proceedings and ordering new proceedings to be commenced.

3. Paragraph (4)(b) expressly authorizes the head of the procuring entity or of the approving authority to require the payment of compensation to the person submitting the complaint. Normally, the compensation would be payable by the procuring entity. However, where the act, decision or procedure complained of was approved by an approving authority, the head of that authority might decide that compensation should be paid by the authority.

[Working Group note: with respect to the types of losses in respect of which compensation may be required, two alternative possibilities are set forth within square brackets for the consideration of the Working Group. Under the first possibility, compensation may be required in respect of any reasonable costs incurred by the person submitting the complaint in connection with the

procurement proceedings as a result of the unlawful act, decision or procedure. Those costs do not include profit from the procurement contract that was lost because of non-acceptance of the the tender or offer of the person submitting the complaint. The types of losses that are compensable under the second possibility are broader than those under the first possibility, and might include lost profit in appropriate cases. The question as to the types of losses that should be compensable was addressed at the tenth session of the Working Group, but no decision was taken (A/CN.9/315, para. 120).]

4. An implementing State should take the following action with respect to the references within square brackets in paragraphs (5) and (6) to article "38 or 40". If the implementing State provides judicial review but not hierarchical administrative review (see paragraph 1 of commentary to article 38), the reference should be only to the article appearing in this Model Law as article 40. If the implementing State provides both forms of review but requires the person submitting the complaint to exhaust his right to hierarchical administrative review before seeking judicial review, the reference should be only to article 38. If the implementing State provides both forms of review but does not require the right to hierarchical administrative review to be exhausted before seeking judicial review, the reference should be to "article 38 or 40."

5. An implementing State may include in the procurement regulations detailed rules concerning review proceedings under this article (e.g., concerning the right of contractors and suppliers participating in the procurement proceedings, other than the one submitting the complaint, to participate in the review proceedings (see article 39); the submission of evidence; the conduct of the review proceedings; and the corrective measures that the head of the procuring entity or of the approving authority may require the procuring entity to take (see paragraphs 2 and 3 of the commentary to the present article)).

6. Review proceedings under this article should be designed to provide an expeditious disposition of the complaint. If the complaint cannot be disposed of expeditiously, the proceedings should not unduly delay the institution of proceedings for hierarchical administrative review or judicial review. To that end, paragraph (4) requires the head of the procuring entity or of the approving authority to issue a decision within [20] days after the submission of the complaint. If the decision has not been issued by the deadline, paragraph (5) permits proceedings for hierarchical administrative review or for judicial review to be instituted immediately thereafter. [Working Group note: the time limit is placed within square brackets in the text of paragraph (4) and in the foregoing sentence to invite the Working Group to consider what length of time should be allowed.]

7. Certain additional rules applicable to review proceedings under this article are set forth in article 39.

* * *

Article 38. Administrative review

(1) A person may submit his complaint in writing to [insert name of administrative body]:

[(a) if his complaint cannot be submitted or entertained under article 37 because of the entry into force of the procurement contract;]

(b) pursuant to paragraph (5) of article 37; or

(c) if the person claims to be adversely affected by a decision of the head of the procuring entity or of the approving authority under article 37.

(2) The [insert name of administrative body] may grant one or more of the following remedies:

(a) declare the legal rules or principles that govern the subject matter of the complaint;

(b) prohibit the procuring entity from acting or deciding unlawfully or from following an unlawful procedure;

(c) require the procuring entity that has acted or proceeded in an unlawful manner, or that has reached an unlawful decision, to act or to proceed in a lawful manner or to reach a lawful decision;

(d) annul in whole or in part an unlawful act or decision of the procuring entity;

(e) revise an unlawful decision by the procuring entity or substitute its own decision for such a decision;

(f) annul the procurement contract, if it has entered into force;

(g) require the payment of compensation [for any reasonable costs incurred by the person submitting the complaint in connection with the procurement proceedings] [for loss suffered by the person submitting the complaint] as a result of an unlawful act or decision of, or procedure followed by, the procuring entity;

(h) order that the procurement proceedings be terminated.

(3) The [insert name of administrative body] shall issue a written decision concerning the complaint, stating the reasons for the decision and the remedies granted, if any.

(4) The decision shall be final unless an action is commenced under article 40.

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 220, 222, 223, 226; A/CN.9/315, paras. 115, 116, 119-121; A/CN.9/331, paras. 10, 153 and 204.]

1. This article provides for hierarchical administrative review. States where hierarchical administrative review against administrative actions, decisions and procedures is not a feature of the legal system might choose to omit this article and provide only for judicial review (article 40).

2. In some legal systems that provide for both hierarchical administrative review and judicial review, proceedings for judicial review may be instituted while administrative review proceedings are still pending, or vice versa, and rules are provided as to whether or not, or the extent to which, the judicial review proceedings supplant the administrative review proceedings. If the legal system of an implementing State that provides both means of review does not have such rules, the State may wish to establish them, e.g., in the procurement regulations.

3. An implementing State that wishes to provide for hierarchical administrative review but that does not already have a mechanism for such review in procurement matters should vest the review function in a relevant administrative body. The function may be vested in an appropriate existing body or in a new body created by the implementing State. The body may, for example, be one that exercises overall supervision and control over procurement in the State (e.g., a central tender board; see article 6 and the accompanying commentary), a relevant body whose competence is not restricted to procurement matters (e.g., the body that exercises financial and control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), a special administrative body whose competence is exclusively to resolve disputes in procurement matters, such as a "procurement review board", or an arbitral tribunal. It is important that the body exercising the review function be independent of the procuring entity. In addition, if the administrative body is one that, under the Model Law as implemented in the State, is to approve certain actions or decisions of, or procedures followed by, the procuring entity, care should be taken to ensure that the section of the body that is to exercise the review function is independent of the section that is to exercise the approval function.

[Working Group note: subparagraph (a) of paragraph (1), set forth within square brackets, should be retained if the Working Group were to decide, in connection with article 37, that the head of the procuring entity or of the approving authority should not be competent to entertain a complaint under that article after the procurement contract enters into force (see Working Group note preceding paragraph 1 of commentary to article 37). Otherwise, it should be omitted.]

4. The persons entitled to institute proceedings under paragraph (1)(c) are not restricted to persons who participated in the proceedings before the head of the procuring entity or of the approving authority (see article 39(2)), but include any other persons claiming to be adversely affected by a decision of the head of the procuring entity or of the approving authority.

5. With respect to paragraph (2), the means by which the person submitting the complaint establishes his entitlement to a remedy depends upon the substantive and procedural law applicable in the review proceedings.

6. Differences exist among national legal systems with respect to the nature of the remedies that bodies exercising hierarchical administrative review are competent to grant. In implementing the Model Law on Procurement, a State may include all of the remedies listed in paragraph (2), or only those remedies that an administrative body would normally be competent to grant in the legal system of that State. If in a particular legal system an administrative body can grant certain remedies that are not already set forth in paragraph (2), those remedies may be added to the paragraph. The paragraph should list all

of the remedies that the administrative body may grant. [Working Group note: the approach of the present article, which specifies the remedies that the hierarchical administrative body may grant, contrasts with the more flexible approach taken with respect to the corrective measures that the head of the procuring entity or of the approving authority may require (article 37(4)(b)). The policy underlying the approach in article 37(4)(b) is that the head of the procuring entity or of the approving authority should be able to take whatever steps are necessary in order to correct an irregularity committed by the procuring entity itself or approved by the approving authority. Hierarchical administrative authorities exercising review functions are, in some legal systems, subject to more formalistic and restrictive rules with respect to the remedies that they can grant, and the approach taken in article 38(2) seeks to avoid impinging on those rules.]

7. Paragraph 3 of the commentary to article 37, concerning the payment of compensation to the person submitting the complaint, also applies to paragraph (2)(g) of the present article. [Working Group note: the Working Group note following paragraph 3 of the commentary to article 37 also applies in respect of paragraph (2)(g) of the present article.]

8. If the procurement proceedings are terminated pursuant to paragraph (2)(h), the procuring entity may institute new procurement proceedings. The provisions of article 7 are relevant in that respect.

9. If detailed rules concerning proceedings for hierarchical administrative review do not already exist in a State implementing the Model Law on Procurement, the State may provide such rules in the procurement regulations. Rules may be provided, for example, concerning the time limit for instituting the hierarchical administrative review proceedings; the right of contractors and suppliers, other than the one instituting the review proceedings, to participate in the review proceedings (see article 39(2)); the burden of proof; the submission of evidence; and the conduct of the review proceedings.

10. Certain additional rules applicable to review proceedings under this article are set forth in article 39.

* * *

Article 39. Certain rules applicable to review proceedings under article 37 [and article 38]

(1) Promptly after the submission of a complaint under article 37 [or article 38], the head of the procuring entity or of the approving authority [, or the [insert name of administrative body], as the case may be,] shall notify all contractors and suppliers participating in the procurement proceedings to which the complaint relates of the submission of the complaint and of its substance.

(2)[[Variant A] Where a complaint is submitted under article 37 [or article 38], after a tender has been accepted or a procurement contract has entered into force, by a person other than the contractor or supplier whose tender has been accepted or who is a party to the procurement contract, that contractor or supplier shall be entitled to participate in the review proceedings to the same extent as the procuring entity.]

[[Variant B] Any such contractor or supplier claiming that its interests are or could be affected by the review proceedings may request to participate in the review proceedings. The head of the procuring entity or of the approving authority [, or the [insert name of administrative body], as the case may be,] shall decide whether or not the contractor or supplier may participate and, if so, the terms of such participation.]

(3) A copy of the decision of the head of the procuring entity or of the approving authority [, or of the [insert name of administrative body], as the case may be,] shall be furnished within [5] days to the person submitting the complaint, to the procuring entity and to any other person that has participated in the review proceedings. In addition, after the decision has been issued, the complaint and the decision shall be promptly made available for inspection by the general public, provided, however, that no information shall be disclosed contrary to any law of [this State] relating to confidentiality.

* * *

Commentary

[Working Group note: This article applies only to review proceedings before the head of the procuring entity or of the approving authority, and before a hierarchical administrative body, but not to judicial review proceedings. There exist in many States rules concerning the matters addressed in this article. Those rules vary from State to State, and it may be considered unfeasible or undesirable for the Model Law on Procurement to establish a uniform rule that may conflict with those rules.]

1. References within square brackets in the heading and text of this article to article 38 and to the administrative body should be omitted by an implementing State that does not provide for hierarchical administrative review.

2. The purpose of paragraphs (1) and (2) of this article is to make contractors and suppliers aware that a complaint has been submitted concerning procurement proceedings in which they have participated or are participating and to enable them to take steps to protect their interests. Those steps may include intervention in the review proceedings under paragraph (2), and other steps that may be provided for under applicable legal rules. [Working Group note: the following sentence may be included if variant A of paragraph (2) is adopted: While paragraph (2) limits itself to the right to intervene by a contractor or supplier whose tender has been accepted or who has become a party to a procurement contract, the procurement regulations or other rules of national law might enable intervention by other contractors and suppliers participating in the procurement proceedings, and might deal with intervention even before a tender has been accepted or a procurement contract has entered into force (see paragraph 5 of commentary to article 37 and paragraph 10 of commentary to article 38).]

[Working Group note: variant A is intended to ensure that the right to participate in the review proceedings is available at least to a contractor or supplier whose tender has been accepted or who has entered into a procurement contract. Under variant B, any contractor or supplier participating in the

procurement proceedings, who claims that his interests are or could be affected by the review proceedings, could request to intervene, but the decision upon such a request is left to the forum of the review proceedings. A distinction is made in variant A between the time of acceptance of a tender (when tendering proceedings are used) and the time of entry into force of the procurement contract (when other means of procurement are used) because, under draft article 32, when the entry into force of the procurement contract is subject to the signature of a written contract, a time gap may exist between the time a tender has been accepted and the time the contract enters into force.]

3. In paragraph (3), "any other person that has participated in the review proceedings" refers to contractors and suppliers participating pursuant to paragraph (2) and any other persons permitted to participate in the review proceedings under the legal rules and practices applicable to those proceedings.

* * *

Article 40. Judicial review

The [insert name(s) of court(s)] shall have jurisdiction over an action commenced by a person referred to in article 36 to review an act or decision of, or a procedure followed by, the procuring entity. Such an action may be commenced by the person:

[(a) as an alternative to submitting a complaint under article 38;]

[[(b) if his complaint cannot be submitted or entertained under article 37 because of the entry into force of the procurement contract;]]

[(c) pursuant to paragraph (5) of article 37;] or

(d) if the person claims to be adversely affected [by a decision of the head of the procuring entity or of the approving authority under article 37] [or] [by a decision of the [insert name of administrative body] under article 38].

* * *

Commentary

[Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 221, 226; A/CN.9/315, paras. 115, 116, 119-121; A/CN.9/331, paras. 153 and 204.]

1. This article provides for judicial proceedings. It confers jurisdiction on the specified court or courts, and specifies the circumstances in which an action may be commenced. The procedural and other aspects of the judicial proceedings, including the remedies that may be granted, will be governed by the law applicable to the proceedings. [Working Group note: that minimalist approach has been adopted so as to avoid impinging on national laws and procedures relating to judicial proceedings.]

2. Subparagraph (a), which appears within square brackets, should be omitted by a State that does not provide hierarchical administrative review, or that requires a person to exhaust his right to hierarchical administrative review under article 38 before seeking judicial review. It should be retained by an implementing State that provides hierarchical administrative review but that does not have that requirement.

[3. Subparagraph (b), which appears within square brackets, should be omitted by a State requiring the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review. It should be retained by a State that does not have that requirement or that does not provide hierarchical administrative review.] [Working Group note: subparagraph (b) and the preceeding paragraph of the commentary should be included if the Working Group were to decide, in connection with article 37, that the head of the procuring entity or of the approving authority should not be competent to entertain a complaint under that article after the procurement contract enters into force (see Working Group note preceeding paragraph 1 of commentary to article 37). Otherwise, they should be omitted.]

4. Subparagraph (c), which appears within square brackets, should be omitted by an implementing State that requires the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review, but should be retained by a State that does not have that requirement or that does not provide hierarchical administrative review.

5. An implementing State should take the following action with respect to the references set forth within square brackets in subparagraph (d). If the implementing State does not provide hierarchical administrative review, the reference should be only to a decision of the head of the procuring entity or of the approving authority under article 37. If the implementing State provides both hierarchical administrative review and judicial review and does not require the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review, the reference should be to a decision of the head of the procuring entity or of the approving authority under article 37 "or" a decision of the administrative body under article 38. If the implementing State provides both forms of review but requires the person seeking review to exhaust his right to hierarchical administrative review before seeking judicial review, the reference should be only to a decision of the administrative body under article 38.

6. The law applicable to the judicial proceedings will govern the question of whether, in an action commenced pursuant to subparagraph (d), the court is to examine de novo the aspect of the procurement proceedings complained of, or is only to examine the legality or propriety of the decision reached in the review proceedings under article 37 or 38.

* * *

Article 41. Suspension of procurement proceedings [and of performance of procurement contract]

[Variant A] The timely submission of a complaint under article 37 [or article 38] or the timely commencement of an action under article 40 shall suspend the procurement proceedings [, or the performance of the procurement contract, if it has entered into force,] pending the

disposition of the review proceedings unless the head of the procuring entity or of the approving authority, [the [insert name of administrative body]] or the court, as the case may be, determines that the suspension would not be in the public interest.

[Variant B] After the timely submission of a complaint under article 37 [or article 38], or the timely commencement of an action under article 40, the head of the procuring entity or of the approving authority, [the [insert name of administrative body]] or the court, as the case may be, may suspend the procurement proceedings [, or the performance of the procurement contract, if it has entered into force,] in order to preserve the rights of the person submitting the complaint or commencing the action pending the disposition of the review proceedings.

* * *

Commentary

1. The purpose of this article is to enable the rights of the person instituting review proceedings to be preserved pending the disposition of those proceedings. [Working Group note: sources: A/CN.9/WG.V/WP.22, paras. 224 and 225; A/CN.9/315, paras. 117 and 118. Two variants are presented for the consideration of the Working Group. Variant A provides for automatic suspension of the procurement proceedings when review proceedings are commenced, unless the head of the procuring entity or of the approving authority, the administrative body or the court determines, on the grounds stipulated in the variant, that the procurement proceedings should not be suspended. That approach is followed in the procurement laws of some countries as an exception to a general rule in judicial or administrative proceedings that the burden is on the party seeking relief. A principal reason in support of the approach is that a person submitting a complaint or commencing a judicial action may not have sufficient time to seek and obtain interim relief. In particular, it will usually be important for the person to avoid the entry into force of the procurement contract pending disposition of the review proceedings and, if he must establish his entitlement to interim relief, he may not have sufficient time to do so to avoid entry into force of the contract (e.g., where the procurement proceedings are in their final stages); see A/CN.9/331, para. 212. Variant B takes into account the fact that serious disruption could be caused by suspension of the procurement proceedings or performance of the procurement contract. Under that approach, the procurement proceedings or performance of the procurement contract is not suspended automatically; rather, the decision of whether or not to suspend rests with the forum.

The references in the text of the article and in the commentary to suspension of the performance of the procurement contract have been placed within square brackets to invite the Working Group to consider whether or not suspension of the contract should be provided for. Although each variant deals with suspension of performance of the procurement contract in the same manner as suspension of the procurement proceedings, it would also be possible to treat those two situations differently, for example by providing for automatic suspension of the procurement proceedings, but providing that performance of the procurement contract may be suspended only if the forum so decides.]

2. In applying the provisions of this article, the forum of the review proceedings would employ any criteria set forth in the procurement regulations or contained in other rules of law applicable to the review proceedings. Such criteria might include, for example, whether the negative consequences from suspending the procurement proceedings [or performance of the procurement contract] are disproportionate to the advantages of the suspension, and the likelihood of the claimant succeeding in the review proceedings.

3. This article does not interfere with a power that the forum of the review proceedings may have under applicable legal rules to grant other forms of interim remedies. Also, it does not interfere with a power to require the person instituting the review proceedings to supply a security to cover possible losses of the procuring entity if the procurement proceedings [or the performance of the procurement contract] are suspended but the complaint of the person seeking review is not successful.

4. The references within square brackets to article 38 and to the administrative organ will depend upon whether or not the implementing State provides hierarchical administrative review.

* * *

Article 42. Disciplinary, administrative or criminal responsibility of procuring entity

The results of review proceedings under this chapter shall have no effect on any disciplinary, administrative or criminal responsibility that the procuring entity, or an officer or employee thereof, may bear under the law of [this State].

* * *

[Working Group note: see A/CN.9/331, para. 151.]

ANNEX II

DRAFT RECOMMENDATION OF THE COMMISSION TO ACCOMPANY ITS ADOPTION OF THE MODEL LAW ON PROCUREMENT

[Working Group note: the following recommendation could be included in the decision of the Commission adopting the Model Law on Procurement, or it could be adopted as a separate decision, with appropriate additional preambular language. The recommendation has been modelled on articles 1 and 2 of the EC review Directive. Some provisions of the Directive that may be necessary or appropriate because of the mandatory character of the Directive have been omitted from the recommendation or have been modified where it was believed that the provisions in question were unnecessary or inappropriate in a recommendation. Other changes have been made to accord with the terminology or concepts used in the Model Law on Procurement.]

The United Nations Commission on International Trade Law,

. . .

Being convinced that an effective means to review the lawfulness of acts and decisions of, and procedures followed by, procuring entities in the context of procurement covered by the Model Law on Procurement is essential to guard against misapplication of the Model Law or of procurement regulations adopted thereunder, to ensure the proper functioning of national procurement systems and to promote confidence in those systems,

Recommends to Governments:

1. that they take the measures necessary to ensure that, as regards procurement falling within the scope of the Model Law on Procurement, the lawfulness of acts and decisions of, and procedures followed by, procuring entities may be reviewed effectively;

2. that they ensure that there is no discrimination between foreign and domestic persons with respect to the right to seek and obtain review or with respect to any other aspect of the review proceedings;

3. that they ensure that review proceedings are available at least to any person having or having had an interest in obtaining a particular procurement contract and who suffers or risks suffering detriment as a result of an unlawful act or decision of, or procedure followed by, a procuring entity in the context of procurement;

4. that they ensure that the review proceedings referred to in the foregoing paragraphs include provision for the powers:

(a) to take, at the earliest opportunity, interim measures with the aim of preventing further detriment to the person concerned, including measures to suspend or to ensure the suspension of the procurement proceedings, the implementation of any decision taken by the procuring entity or the performance of the procurement contract;

(b) either to set aside or to ensure the setting aside of decisions taken unlawfully;

(c) to award compensation to persons suffering detriment as a result of an unlawful act, decision or procedure;

5. that they ensure that decisions taken by bodies responsible for review proceedings can be effectively enforced;

6. that written reasons for decisions in review proceedings before non-judicial bodies shall always be given;

7. that, even where non-judicial review proceedings are provided, provision also be made for judicial review proceedings;

8. that, except in the case of review proceedings instituted in the first instance before the procuring entity, the bodies responsible for review proceedings be independent of the procuring entity.